SUPREME COURT U. S.

JUN 28 1968

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 1015

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois.

Respondents.

(On Writ of Certiorari to the Supreme Court of Illinois)

PETITION FOR REHEARING

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PETITION FOR REHEARING

I.

THE COURT SHOULD CHANGE ITS MANDATE FROM "REVERSED" TO "VACATED AND REMANDED" OR "REVERSED AND REMANDED."

Under Illinois law the word "Reversed" at the end of an opinion means that the judgment of conviction is reversed outright and the case is not remanded for further proceedings. People v. Martin, 380 Ill. 328, 340; 44 N.E. 2d 49, 54 (1942); People v. Gardner, 35 Ill. 2d 564, 573; 221

N.E. 2d 232, 237 (1966). Such a mandate has the effect of a complete discharge and operates to preclude additional proceedings. The same appears to be true under federal law. See Haynes v. United States, 390 U.S. 85, 101 (1968), Grosso v. United States, 390 U.S. 62, 71-72 (1968).

"Reversed" seems to be an appropriate mandate only when all further proceedings would inevitably result in a reversal of conviction. Grosso v. United States, 390 U.S. at 71, Haynes v. United States, 390 U.S. at 101. In some cases the word "Reversed" has been qualified by a preceding sentence to the effect that the case will be remanded for further proceedings consistent with the opinion. See United States v. Ballard, 322 U.S. 78, 88 (1944), United States v. Beach, 324 U.S. 193, 196 (1945); Gibson v. United States, 329 U.S. 338, 351, 361 (1946).

It is clear from n.21 of the Opinion that outright reversal of the conviction is not contemplated by the Court. The Court seems to envision a resentencing procedure if one can be devised in Illinois. Cases involving resentencing are usually reversed and remanded. Yasui v. United States, 321 U.S. 115, 117 (1943); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 481 (1947) (dissenting opinion). Even if the conviction itself were to fall the case should be reversed and remanded presumably for a new trial. Asheraft v. Tennessee, 322 U.S. 143, 156 (1944); 327 U.S. 274, 279 n.1 (1946); Mapp v. Ohio, 367 U.S. 643, 660 (1961). See Petr's. Br. p. 43. In this case in particular, the meaning of the word "Reversed" is unclear since what is involved is a collateral attack in a state court on a state conviction. Presumably it is only the denial of the state collateral remedy that is reversed. In that event the necessity of further proceedings is manifest and the case should be remanded.

Ordinarily cases are returned to the court to which certiorari was granted. And especially in cases where no guidance as to future proceedings is given the case should be returned to allow the State legislature or judiciary to devise some procedure if they can. See Note, 81 Harv. L. Rev. 1260, 1262 (1968). Of particular significance is the mandate issued in a prior Illinois case wherein this Court determined that Illinois law improperly restricted a poor person's right to appeal. There the remedy was to "vacate and remand" to allow Illinois to devise some means for satisfying its constitutional obligations. Griffin v. Illinois, 351 U.S. 12, 20 (1956). The same mandate is appropriate here if the Court fails to clarify the opinion or sanction a procedure for resentencing.

II.

THE COURT IMPROPERLY DECIDED THIS CASE ON A GROUND OUTSIDE THE SCOPE OF THE GRANT OF CERTIORARI UNDER CIRCUMSTANCES THAT MAY WELL BE SAID TO DEPRIVE THE RESPONDENTS OF FAIR NOTICE.

The principal ground of the opinion is that a jury composed solely of persons without conscientious scruples against punishment is unfair on the issue of punishment. In the Circuit Court of Cook County and in the Supreme Court of Illinois the petitioner raised no question as to the fairness of the jury on the issue of punishment, nor did he challenge the sufficiency of voir dire examination of jurors. Indeed, it would be fair to say that petitioner conceded the fairness of the jury on the issue of punishment and advanced an argument that the State's interest in getting a fair punishment jury should not interfere with the defendant's right to have a fair guilt jury, urging the in-

stitution of a judicial sentencing or bifurcated trial procedure. E.g. n.18 of the Opinion of this Court. Petr's. Br. p. 42-43.

The Petition for Certiorari did not raise any question of the fairness of the jury or punishment but merely asked if it were error to refuse to allow petitioner to introduce proof to support his allegations that the jury was unfair on the issue of guilt or innocence. Certiorari was granted and "limited" to the issue of jury fairness on the question of guilt or innocence. 389 U.S. 1035 (1968). This limitation was the Court's and not the respondent's. It was echoed in the grant of certiorari in Bumper v. North Carolina, 389 U.S. 1034 where the death penalty was not given.

The issue of jury fairness on punishment was first raised in a brief passage (pp. 33-36) in petitioner's opening brief, yet even in his opening brief, petitioner demanded only a new trial not a resentencing. (Petr's. Br. p. 43). The respondent Woods replied that the issue was not raised below and was outside the scope of the grant of certiorari and that it would not reply unless directed to do so by the Court. (Resp. Wood's Br. 37-38). Petitioner's reply brief closed with a brief paragraph reiterating the punishment argument (p. 45). The issue of punishment was not raised at oral argument.

For this Court to have decided this case on the issue it did is to violate rules of fair notice reiterated by this Court as recently as April, 1968. See In Re Ruffalo, —— U.S. ——; 88 Sup. Ct. 1222, a case involving far more adequate notice than that received by respondents herein. A decision on a ground not raised in the lower courts and far outside the grant of certiorari makes litigation in this Court a trap for the unwary ensnaring not only the litigants but the judges whose decisions are subject to review.

III.

THE COURT SHOULD RECONSIDER ITS DECISION ON THE MERITS AND ORDER BRIEFS AND ARGUMENT DIRECTED TO THE FAIRNESS OF THE JURY ON THE ISSUE OF PUNISHMENT.

The Court reached its decision that the jury was unfair on the question of sentence without the benefit of briefs or argument. We respectfully submit that this proposition is not so "self-evident" as to warrant the deprivation of respondent's day in court. Respondents should not be penalized for confining their argument to the limitations of the grant of certiorari.

A. The Proper Construction Of Discretion As To Penalty In A State Statute Is A State Matter And Presents No Constitutional Issue.

The basic premise of the Court's Opinion is its statement "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State . . ." (pp. 7-8). The respondents have two objections to the statement. First, it is overstated. Opposing and favoring capital punishment is not the same thing as having or not having conscientious scruples concerning capital punishment. The same polls which show that 42% of the population favor capital punishment also show that 65% of the population do not have scruples against capital punishment.[1] See Zeisel, Some Data on Juror Attitudes Toward Capital Punishment, p. 8.

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1. To the extent the Opinion is grounded on the result of polls it may have an ephemeral value. We doubt that a Gallup Poll conducted after recent assassinations would show that a minority of persons favor capital punishment.

Second, and more important, the nature and extent of the discretion to be exercised by the jury on the issue of punishment is one of state law. The Court seemingly recognizes that a State may impose a mandatory death penalty. But the Court asserts that "Illinois has attempted no such thing." p. 8, n. 15. With all due respect, the Court does not have the authority to say what Illinois has or has not done. Only the Supreme Court of Illinois has that right. Williams v. Oklahoma, 358 U.S. 576, 583 (1959). In Illinois the mandatory death penalty was abolished after the exclusion of scrupled persons from juries was incorporated into Illinois law. (Juror exclusion was sanctioned in 1853. Gates v. People, 14 Ill. 433. Jury discretion over the death penalty was adopted in 1867. Laws 1867, p. 90, § 1. In 1869 the juror exclusion rule was codified by statute. Laws 1869, p. 112, § 4.) The degree of discretion to be vested in the jury in Illinois is a matter of Illinois law upon which the Illinois Supreme Court should rule in the context of petitioner's argument. This argument concerning jury fairness on punishment in relation to jury discretion on punishment was not presented to the Illinois Supreme Court in this case and, at the very least, this Court should require an adjudication before making a ruling on an issue dependent totally upon a construction of state law.

In fact nearly every state Court has held that the discretion given to the jury is limited under state law to determination by juries without conscientious scruples against capital punishment. See Brief for Respondent Woods pp. 38-39, n. 12. In particular the New Jersey Supreme Court has held that the discretion vested by the Legislature in the jury is a discretion to be exercised on the basis of the evidence before it and not on the basis of pre-trial principles. State v. Reynolds, 43 N.J. 597, 602-

03, 206 A. 2d 750, 753 (1965) and this holding was given in the context of a state law which does not require that jurors be asked on voir dire if their scruples will influence their verdict. State v. Favorito, 115 N.J.L. 197, 199-201; 178 Atl. 765, 766-67 (1935). Even the Court in Crawford v. Bounds, hardly unsympathetic to petitioner's argument, recognized that part of the state law as to sentence in capital cases is the provision which prevents those who would rarely or never impose the death penalty from sitting in capital juries. See Petr's. Reply Br. Appendix pp. 9-10.

B. The Jury Was Not Unfair On The Issue Of Punishment.

The Court concludes that it is "self-evident" that the jury was not fair on the issue of punishment. To Oberer and McClelland it was "self-evident" that a verdict of guilty returned by a non-scrupled jury was constitutionally infirm. Yet this Court, after considering briefs and argument, determined that this latter proposition was not evident and had not been demonstrated. If anything, the record on the question of jury fairness on guilt is far more extensive than it is on the question of jury fairness on punishment.[2] Yet the Court refrains from deciding the first issue but pursues the second without briefs or argument.

The notion that persons without conscientious scruples against capital punishment constitutes a distinct and dwindling minority is based on a poll asking persons if they were "opposed" to capital punishment. The only poll dealing with conscientious scruples shows, however, that

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2. Only two of petitioner's studies purported to establish some relation between the existence of scruples and the assessment of punishment.

65% of Americans have no such scruples. Zeisel, op. cit, supra, p. 8. This is hardly a distinct and dwindling minority, and, of course, the substitution of public opinion polls to determine majority or minority positions is inconsistent with the notion of legislative determination by the elected representatives of the People.

The assertion that the jury was organized to return a verdict of death is rather unfair. In the five years from 1963 through 1967 in Cook County the State secured the death penalty in only nine cases out of twenty where the penalty was sought. And it must be clear that the prosecutors in Cook County have selected only the most aggravated cases in which to ask for the death penalty since the twenty capital cases were drawn from about eleven hundred murder indictments. These figures do not show the presence of jurors uncommonly willing to condemn a man to die.[3]

Finally, this Court should at least limit its holding to allow review on a case by case basis. The killing of a police officer acting in the line of duty under the circumstances of this case does not present a close question on the issue of punishment nor does the killing of a prison guard by a man under sentence for murder nor do numerous others. Surely these cases, where no reasonable argument against capital punishment can be made on the facts of the case, should not fall under the Court's ruling.

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3. The Court quotes with implicit approval Arthur Koestler's observation that those who would vote for capital punishment are without charity and fail to pass the test of humanity. P. 9, n. 17. Aside from the fact that this observation applies to a majority of the United States Congress and innumerable other respectable citizens we think the words of Mr. Justice Holmes in another context apply quite well to Mr. Koestler's book, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statistics." Lockner v. New York, 198 U.S. 45, 75 (1905) (dissenting opinion).

C. The Argument Concerning Jury Fairness On Punishment Is Waived.

At the price of painful repetition, respondent notes again that the fairness of the jury on the issue of punishment and the sufficiency of questioning on voir dire were never raised until after the petitioner's Petition for Certiorari was granted. The Supreme Court of Illinois did not hear argument or decide the issue. In light of even the relatively brief summary of the litigation in this case in the Opinion of Mr. Justice Black (pp. 2-4) it is clear that petitioner had an inordinately large number of opportunities to raise any complaints about the fairness of the jury that fixed his punishment. Of course the rule of waiver has been ignored before but never in a case involving waiver at trial, on appeal, in at least three collateral proceedings including two appeals therefrom and a certiorari petition. Nor has waiver been ignored in a case where proof of guilt is not disputed and the sentence not unjust on the facts. In particular the failure to object at trial or to raise the issue in this case put the State in a position where nothing short of an entirely new trial at least on the issue of penalty must be had and this not until eight years after verdict.

IV.

THE DECISION SHOULD BE MADE PROSPECTIVE FOR ALL PERSONS OR, AT THE VERY LEAST, THE ISSUE SHOULD BE BRIEFED AND ARGUED. IF THE DECISION IS TO HAVE RETROACTIVE EFFECT, THIS COURT SHOULD HEAR ARGUMENT AND ESTABLISH A PROCEDURE FOR RESENTENCING OR RETRIAL.

The primary factors here are two. One, there has been great reliance on the part of prosecutors throughout the

nation on the propriety of the procedure used in this case. This reliance was based upon considerably more than the case of Logan v. United States, 144 U.S. 263 (1892). Several federal cases preceding and following Logan approved the procedure as well as the numerous state cases cited in Respondent Woods Brief at p. 8-13, n. 1.

Second, the impact of a retroactive holding is quite considerable. Hearings will be necessary in the case of every jury-sentenced defendant awaiting execution. Delay and crowded dockets will be inevitable and the problem will be aggravated in cases where the voir dire has not been transcribed. Neither Illinois nor most of the other states provide for separate penalty proceedings. And in Illinois as in most States the jury verdict is an essential prerequisite to sentence in a capital case. See Opinion of Mr. Justice Douglas, pp. 2-4. The net result is that, while this Court purports to challenge only sentence and not conviction, upon remand the only State procedure may be to provide an entirely new trial. Otherwise it may be argued that there is no procedure for passing of a valid sentence of any sort in the absence of a fresh jury verdict. Even if a prison sentence were possible without a new trial the State could not be reasonably expected to abandon its legitimate interest in attempting to secure the imposition of the death penalty. Further, the policy of state law in many instances is to deem verdict of guilty and punishment inseparable so that any error in respect to punishment proceeding will require a new trial.

Of course, the State's may argue in their own courts that where there is no legislative procedure for resentencing in capital cases then the court should develop rules for resentencing in the absence of statute. Presumably the States will ask for some form of judicial sentencing which petitioner so vigorously advocated. Yet even if the States

should win this argument, the decisions will create a flood of new litigation concerning *ex post facto* laws. And even a complete re-trial will give rise to claims of double jeopardy.

In the case of petitioner, the State will at least have the argument that he consistently sought judicial sentencing and that his motion might well be granted now. However in the State of Illinois and, we suspect, in the majority of other States, a retroactive holding will, at the least, create a new and endless flow of litigation and, at the most, result in new trials on stale evidence, if any, of what are collectively the worst and most dangerous men in this country.

Certainly, at least reargument is required to allow the parties to elucidate the consequences of a retroactive holding. No argument was addressed to this problem because it was not envisioned that this Court would adopt an opinion preserving the conviction and vacating the sentence.

Finally, in light of the retroactive holding, the Court should further decide the procedure to be followed on resentencing. Specifically the Court should decide whether it is possible for Illinois to resentence petitioner to death without granting a complete retrial. And, if this is possible, will a judicial resentencing or a resentencing before a second jury be objectionable on any constitutional grounds, in particular *ex post facto* grounds. The decision of the Court, as it now stands, is unfair to both the States and the defendants in cases where sentence of death has been imposed. The lack of clarity concerning resentencing, if not corrected, will cause needless confusion and cost to the States and needless anxiety to defendants in a class of cases where swift and certain proceedings are the only kind that satisfy the dictates of both justice and mercy.

Reargument to consider these issues should be granted.

V.

THE PRECISE SCOPE OF THE OPINION SHOULD BE CLARIFIED.

There is a fundamental difference between prosecution and defense counsel. A skilled, dutiful defense counsel will not hesitate to argue and advocate a legal theory helpful to his client no matter how often it is rejected. The ruling in Miranda v. Arizona, 384 U.S. 436, (1966) was handed down after similar arguments had failed for years. Prosecution counsel must abide by the decisions of higher courts or suffer almost certain reversal, a risk not often shared by defense counsel. Only rarely has the prosecution the opportunity to argue that a previous decision of constitutional dimensions be overruled.

Consequently it is, we think, incumbent upon the Court to be especially clear in ruling against commonly accepted prosecution practices. Mr. Justice Black characterizes the Opinion as a "thinly veiled warning to the States that they had better change their jury selection procedures" (p. 8). Whether this be true or not we can not say but we do say the prosecutors of this nation prefer their warnings to be unveiled and crystal clear. If the Court does not approve of the present jury selection procedure or the methods by which capital punishment is fixed, we would prefer a definite holding to that effect coupled with a ruling that the States will be given a certain period of time (e.g., two years to allow for those States in which Legislatures meet biennially) to adopt a satisfactory procedure. The mandate might follow the methods used in the constitutional landmark Brown v. Board of Education, 349 U.S. 294 (1955). This technique would clarify the questions of retroactivity and would give the States fair notice as to which of their procedures are in danger. It could be

said to this that the Court would then be intervening in the province of State Legislature but the plain fact is that the Court has intervened. What we ask now is the use of a better method of intervention.

CONCLUSION

The respondents respectfully request that the Court grant this Petition For Rehearing and affirm the judgment below. In the alternative, we ask the Court to change its mandate from "reversed" to "vacated and remanded." Further we ask the Court to make its ruling prospective for all cases and allow the States a reasonable time to change their procedures to comply with the Court's rulings.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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Respectfully submitted,

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